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Product Liability & Toxic Torts

The Relationship Between The Products Liability Act and The Consumer Fraud Act

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The New Jersey Products Liability Act ("NJPLA"), adopted in 1987, has now reached adulthood. Another important New Jersey statute, the Consumer Fraud Act ("CFA"), has been around even longer, having first been adopted in 1960. Yet, it was not until this year that the New Jersey Supreme Court began to clarify the relationship between the two acts and to resolve the important question of whether a NJPLA claim subsumes a potential CFA claim. This article will address the Supreme Court decision and other recent cases on this subject and explore possible open issues regarding the relationship between the two acts.

The key New Jersey Supreme Court decision in this area was issued on June 4 in *Sinclair v. Merck & Co., Inc.*, 195 N.J. 51 (2008). This putative class action suit, involving the pain killer Vioxx, was brought by plaintiffs seeking to recover the cost of medical monitoring despite not asserting a present personal injury. The bulk of the decision was devoted to the Supreme Court's finding that plaintiffs' claim for medical monitoring damages failed because plaintiffs, absent a personal physical injury, could not satisfy the definition of harm under the NJPLA.

Significantly, the court also rejected plaintiffs' efforts to side step the NJPLA requirements by asserting an alternative claim under the CFA. The court noted that the legislature, in enacting the NJPLA, provided that claims for "harm caused by a product" are governed by the NJPLA "irrespective of the theory underlying the claim." Reiterating its analysis in *In Re Lead Paint Litigation*, 191 N.J. 405, 436-37 (2007), the court noted that "[t]he language chosen by the Legislature in enacting the NJPLA is both expansive and inclusive, encompassing virtually all possible causes of action in relating to harms caused by consumer and other products." The court then reasoned that the NJPLA "represents a clear legislative intent that, despite the broad reach we give to the CFA, the PLA is paramount when the underlying claim is one for harm caused by a product." Significantly, the court found that plaintiffs' claim was in essence a product claim because at the "heart of plaintiffs' case is the potential for harm caused by Merck's drug." Finding that plaintiffs' purported CFA claim did not fall within an exception to the NJPLA, but rather within its scope, the court concluded that plaintiffs could not pursue a CFA claim.

Coincidentally, a mere few days before the *Sinclair* decision, the Appellate Division in *McDarby v. Merck & Co., Inc.*, 401 N.J. Super. 10 (App.Div.), *certif. granted on other grounds*, No. 62,586 (N.J. October 8, 2008), reached a similar conclusion in another Vioxx case. In *McDarby*, plaintiffs sued for personal injury damages under the NJPLA and for economic loss under the CFA. Plaintiffs asserted that Merck violated the CFA by misrepresenting the safety of Vioxx. The jury, among other things, determined that the CFA had been violated and awarded damages of approximately $4,000 dollars to *McDarby* consisting of out-of-pocket costs. Following the trial, the judge also awarded millions of dollars in attorney's fees and costs under the CFA.

As in *Sinclair*, the Appellate Division made the key finding that at its core, plaintiffs' claim was a product liability claim based on failure to warn of dangers from Merck's prescription drug. Further, the court observed that the alleged economic "harm" upon which plaintiffs' claims were based, consisting of a loss deriving from personal physical illness, injury, death and other forms of physical harm covered by the NJPLA, was encompassed within the definition of harm set forth in the NJPLA. Noting that one of the goals of the NJPLA was to limit the liability of manufacturers, permitting an expanded form of relief under the CFA, with its attendant rights to treble damages and attorney's fees, "would be to destroy the balance established between the interests of manufacturers, the public and individuals established by the Legislature in enacting the PLA ... ." Given that a fraudulent withholding of safety information claim under the CFA "would

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be available to most product liability plaintiffs claiming a failure to warn," the court would effectively be permitting an award of attorney's fees in the majority of product liability cases without Legislative authorization for such relief. See also *Bailey v. Wyeth, Inc.*, No. MID-L-0999-06 MT, slip op. (Law Div. July 11, 2008) (trial judge case managing hormone replacement therapy cases ruled that plaintiffs' CFA claim pursued in a failure to warn tort case was subsumed by the NJPLA).

The primacy of the NJPLA in cases involving pharmaceutical products is not absolute, however. In an interesting unpublished decision issued by the Appellate Division in March, the court ruled that a pharmaceutical case premised on false advertising could proceed under the CFA and common-law negligent misrepresentation. *Wendling v. Pfizer, Inc.*, No. L-348-04, 2008 WL 833549 (N.J. Super. Ct. App. Div. March 31, 2008). This case involved a veterinary antiparasitic drug used to treat various parasites that tend to infest horses. Plaintiffs, the owners of a racehorse, gave their horse an antiparasitic drug sold by Pfizer. Unfortunately, despite ingesting the medication, the horse died from an infestation of tapeworms. Plaintiffs acknowledged that the label for this medication listed four specific types of parasites treated by the drug, a list that did not include tape worms. They nevertheless alleged that the advertisement for the product was false and misleading because it stated that it would "prevent and control parasites every day" but in fact did not prevent or control tape worms. The Appellate Division affirmed the trial courts' finding that plaintiffs could not establish a CFA claim.

Having dispensed with the CFA and negligent misrepresentation claims, the court nevertheless, in dictum, addressed the issue of whether the NJPLA barred those claims. The court ruled that the NJPLA did not bar the CFA claim because plaintiffs had not pursued a classic products liability failure to warn claim. The court found that rather than asserting a claim that the product was not reasonably fit for its intended use because of lack of adequate warnings or instructions, plaintiffs' claim instead centered on an allegedly misleading advertisement — a claim clearly falling within a covered practice of the CFA. Relying on the New Jersey Supreme Court decision in *Lemelledo v. Beneficial Management Corp. of America*, 150 N.J. 255 (1997), the court further observed that the CFA should be broadly construed and applied in conjunction with other statutes or common law except where there is a direct and unavoidable conflict between the CFA and the other laws. Finding that there was no such conflict and that at its essence, plaintiffs' claim "was not the product itself that caused the harm, but allegedly its misleading promotion," the court ruled that the CFA and negligent misrepresentation claims were not subsumed by the NJPLA.

Despite these recent cases, the last word has hardly been written about the relationship between the NJPLA and CFA. Some of the open questions include the following:

Most of the cases cited in this article involved prescription medications regulated by the FDA. A good argument can be made that the primacy of the NJPLA should be strongly recognized in cases involving drugs and devices, products closely and extensively regulated by the FDA. Further, the NJPLA unquestionably provides special legal protections to manufacturers of such drugs and devices that further favor the blocking of CFA claims. See, e.g., N.J.S.A. 2A:58C-4 (providing rebuttable presumption that warning or instruction given in connection with a drug or device, approved or prescribed by the FDA, is adequate) and N.J.S.A. 2A:58C-5 (prohibiting punitive damages for products approved by the FDA unless the product manufacturer knowingly withheld or misrepresented material information to the FDA).

Should the same primacy be recognized for other products that are not subject to FDA regulation? The NJPLA, by establishing a unitary products liability claim, subject to certain definitions, defenses, limitations and other legal requirements, applies to all types of products. Carving out exceptions for products not subject to extensive regulatory activity, therefore, would appear to deviate from the legislature's intent to partially codify and clarify the rules for all products liability litigation in the state. In short, allowing the simultaneous pursuit of products liability claims and overlapping CFA claims would conflict with the goals behind the NJPLA.

But we are still left with the basic issue of what exactly is the line of demarcation between a classic products liability and a true advertising or other consumer fraud claim. In *McDarby*, for example, the Appellate Division cogently noted that plaintiffs' fraudulent marketing CFA claim largely overlapped with their NJPLA failure to warn claim. This plainly supported the primacy of the NJPLA claim. But what about a case in which it is unclear whether the heart of plaintiffs' suit is really a products or a CFA claim? Additionally, what if the plaintiff chooses not to assert a products liability claim at all but rather solely pursues a CFA claim, perhaps in order to enhance chances of class certification and allow for possible recovery of treble damages and counsel fees? Should the claim be precluded if the facts of the case warranted a traditional products claim that the plaintiff deliberately decided not to assert?

These and other questions undoubtedly will have to be addressed in future cases. ■